STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PIERCE JOHNSON, JR. AND STEVE BOHNSTEDT,	)	
Charging Parties,	)	Case No. LA-CE-253-S
v.	)	PERB Decision No. 962-S
STATE OF CALIFORNIA, DEPARTMENT OF YOUTH AUTHORITY,	)	December 4, 1992
Respondent.	)	

Appearance: Pierce Johnson, Jr., on his own behalf.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Pierce Johnson, Jr. (Johnson) of a Board agent's dismissal of his unfair practice charge. The Board agent dismissed the charge which alleged that the State of California, Department of Youth Authority (State or DYA) committed numerous acts of unlawful reprisals and discrimination in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519(a) states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

The Board has reviewed the entire record in this case, including the warning and dismissal letters, the unfair practice charge and its attachments, and Johnson's appeal.[2] The Board affirms the dismissal on the basis set forth below.

FACTUAL SUMMARY

Johnson and Steve Bohnstedt (Bohnstedt) were employed by the State as youth counselors at the Fred C. Nelles School for Boys. Between the two of them, Johnson and Bohnstedt filed at least ten grievances covering various work-related issues since approximately June 1990.

On March 24, 1992, Johnson and Bohnstedt filed an unfair practice charge against the State. The charge alleged that numerous unlawful adverse actions were taken individually and collectively against them.

Among these charges, Bohnstedt alleged that following an injury resulting from an assault by a DYA ward on June 27, 1991, Bohnstedt's supervisor repeatedly harassed him by interfering with his timely receiving of medical and workers compensation benefits.

On August 20, 1991, Johnson filed an injury report complaining of considerable stress. On September 27, 1991, following medical and psychiatric evaluations, Superintendent Henry C. Vander Weide (Vander Weide) issued a memo instructing

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employees because of their exercise of rights guaranteed by this chapter.

[2]The appeal of the Board agent's dismissal was filed solely by Johnson.

Johnson to reduce the number of overtime hours he worked to a maximum of sixty hours per month. This restriction would be in effect for six months after which his physical status would be evaluated. The memo stated, in part:

> Medically, it is being recommended that you reduce the total number of hours you are currently working. The medical difficulties you are experiencing may be caused by the time you are spending at work beyond your normal work week. During the months of June 1991 you worked 143 1/2 hours of over time, 89 hours in July and 139 3/4 in August.

Johnson claimed that the reduction in overtime hours represented more than a 50 percent cut in his overtime earnings. He alleged that the order to reduce his overtime hours was taken in response to "the volume of grievances filed by both charging parties."

BOARD AGENT'S DISMISSAL

The Board agent found that the charge alleged unlawful adverse actions which occurred more than six months prior to the filing of the charge. The charge was filed on March 24, 1992, thus all allegations of unlawful conduct by the State occurring prior to September 24, 1991, were dismissed as untimely filed.[3]

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[3]Dills Act section 3514.5(a) states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge . . . .

The Board agent found only Johnson's overtime reduction claim timely filed.

The Board agent also noted that the State and the California Correctional Peace Officers Association (CCPOA) were parties to a collective bargaining agreement (CBA) with effective dates of May 26, 1989 through June 30, 1991. The Board agent found that under Dills Act section 3514.5(a),[4] and the Board's decision in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the charge must be dismissed and deferred to binding arbitration because the grievance machinery covers the dispute raised, retaliation for protected activity, and culminates in binding arbitration. The conduct complained of by the charging parties is arguably prohibited by Article V, section 5.03(a) of the parties' CBA. Despite the fact that the alleged unlawful conduct occurred after the expiration of the CBA, the Board agent found that pursuant to Anaheim City School District (1983) PERB Decision No. 364 (Anaheim), the grievance and arbitration procedure survives the expiration of the CBA, thus requiring that

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[4]Dills Act section 3514.5(a) states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

the matter be deferred to the parties' contractual arbitration process.

Finally, the Board agent concluded that even assuming the charge is not deferrable to arbitration, Johnson failed to state a prima facie violation under the standard established in Novato Unified School District (1982) PERB Decision No. 210. The Board agent determined that Johnson failed to demonstrate the "necessary connection or 'nexus' between the adverse action and the protected conduct."

CHARGING PARTY'S APPEAL

On appeal, Johnson contends the Board agent erred by failing to find that the reduction in overtime hours constituted unlawful retaliation for his participation in protected activity. Johnson asserts that Vander Weide's reliance on the psychiatric evaluation does not justify a reduction in overtime as it recommended that a separate medical evaluation be obtained to determine if a work restriction was necessary. Johnson further argues that had the overtime reduction been validly imposed for medical reasons, Vander Weide would have informed the superintendent at the Department of Youth Authority, Los Angeles Metro Parole, where Johnson worked an additional 25 hours per week, of the medical necessity to reduce his hours. Johnson contends that Vander Weide's failure to provide this information to the other DYA facility is evidence of unlawful motivation.

DISCUSSION

In order to state a prima facie violation of the Dills Act a charging party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. (San Dieguito Union High School District (1982) PERB Decision No. 194.)

Johnson and Bohnstedt's charge was filed on March 24, 1992. Thus, all allegations of unlawful conduct by the State occurring prior to September 24, 1991 are untimely and must be dismissed. Vander Weide issued his memo limiting Johnson's overtime on September 27, 1991, within the six-month filing period. Therefore, all allegations, other than Johnson's allegation concerning the reduction in overtime hours, are hereby dismissed as untimely filed.

In Lake Elsinore, the Board held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred to arbitration if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct alleged in the unfair practice charge is arguably prohibited by the provisions of the CBA. PERB Regulation section 32620(b)(5)[5] also requires that a charge be

[5]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

dismissed where the allegations are properly deferred to binding arbitration.

Here, the State and CCPOA, the exclusive representative, were parties to a CBA with effective dates of May 26, 1989 through June 30, 1991. In this case, the parties' CBA contains grievance provisions which culminate in binding arbitration. Additionally, the conduct alleged in the unfair practice charge, retaliation for protected activity, is arguably prohibited by Article V, section 5.03(a) of the CBA, which parallels Dills Act section 3519(a). Further, although the conduct complained of occurred after the CBA expired, in Anaheim the Board held that the grievance and arbitration provisions of a CBA survive the expiration of the agreement. Thus, under the Board's decisions in Lake Elsinore and Anaheim, this charge would be dismissed and deferred to arbitration.

However, in Litton Financial Printing Div. v. NLRB (1991) ____U.S.____, 115 L. Ed.2d. 177 [137 LRRM 2441] (Litton), the U.S. Supreme Court upheld the National Labor Relations Board's (NLRB) rule that arbitration clauses do not continue in effect after the expiration of a collective bargaining agreement, except for disputes that involve facts and occurrences that arose before expiration, or that involved post-expiration conduct that infringes on rights accrued or vested under the agreement. In reaching this conclusion, the court clarified its position in Nolde Bros., Inc. v. Bakery Workers (1977) 430 U.S. 243 [94 LRRM 2753] (Nolde Bros.), which the PERB Board relied upon in reaching

its decision in Anaheim that arbitration is presumed to continue in effect after expiration of the agreement.

In Litton, the U.S. Supreme Court noted the well-established rule that an employer commits an unfair labor practice if, without bargaining to impasse, it makes a unilateral change in an existing term or condition of employment. This prohibition extends to changes in terms and conditions where an existing agreement has expired and negotiations on a new agreement have not yet been completed. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) The NLRB has determined, however, that under the National Labor Relations Act (NLRA) there are certain terms and conditions of employment which do not survive expiration of an agreement because of NLRA statutory language. Further, in Litton, citing Hilton-Davis Chemical Co. (1970) 185 NLRB 241, 242 [75 LRRM 1036], the court stated that:

> [a]rbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a 'voluntary surrender of the right of final decision which Congress ... reserved to [the] parties....[A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize.'

In United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416], the court held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." The court further stated that "[n]o obligation to arbitrate a labor dispute arises solely by

operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." (Gateway Coal Co. v. Mine Workers (1974) 414 U.S. 368, [85 LRRM 2049].)

However, the Court in Nolde Bros., while acknowledging that arbitration is a creature of contract and that a party cannot be compelled to arbitrate in the absence of a contractual obligation to do so, concluded that the arbitration clause does not automatically expire. Because the parties must be aware of the strong policy favoring private resolution of disputes, the court reasoned that the parties' failure to exclude from arbitrability disputes arising after expiration of the agreement, indicates an intent to arbitrate all grievances arising out of the contractual relationship.

The PERB Board in Anaheim relied on the Nolde Bros. decision, concluding that arbitration survives the expiration of an agreement unless the contract expressly or impliedly indicates that the parties intended that the arbitration provision terminate on expiration of the agreement. The Board stated in Anaheim:

> In Nolde Bros., therefore, the Supreme Court established a rebuttable presumption of arbitrability where the dispute arises out of a right "arguably created" by the expired collective agreement, where the parties have agreed to submit contractual disputes to arbitration, and where there is no clear evidence of an intention by the parties that the duty to arbitrate will terminate upon expiration of the agreement. (Anaheim, p. 18.)

In Litton, the U.S. Supreme Court clarified its position in Nolde Bros. stating that this presumption should apply "only where a dispute has its real source in the contract." As the court explained:

> The object of an arbitration clause is to implement a contract, not to transcend it. Nolde Bros. does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of Nolde Bros. The Nolde Bros. presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

In balancing the policy encouraging private resolution of disputes with established contract principles that a party may not be compelled to arbitrate a matter it did not agree to arbitrate, the Board approves of the approach limiting extension of the arbitration clause. Accordingly, the Board adopts the court's reasoning in Litton and finds that arbitration clauses do not continue in effect after expiration of a collective bargaining agreement except for disputes that: (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement. Therefore, the Board hereby overrules that portion of Anaheim which held

that arbitration survives expiration of the agreement unless expressly or impliedly excluded.

Applying these principles to the present case, the State's duty to arbitrate Johnson's retaliation claim fails as the adverse action taken by the State occurred after the expiration of the agreement. Additionally, although Johnson retains a statutory right under the Dills Act to be free from employer retaliation, he obtains no vested right under the contract to be free of such retaliatory action. Furthermore, the expired agreement provides no independent authority which, under normal principles of contract interpretation, requires the arbitration provisions to continue. Because the State's duty to arbitrate this matter does not continue in effect after expiration of the agreement, the Board may not dismiss and defer this charge to arbitration. PERB remains the appropriate forum for resolving such disputes in the absence of contractual provisions for binding arbitration.

Because this charge is not deferred to arbitration, the Board then looks to determine whether the charging party has established a prima facie violation of discrimination. Dills Act section 3519(a) prohibits reprisals or discrimination against an employee for engaging in conduct protected by the Dills Act. In order to prove an allegation of reprisal/discrimination, the charging party bears the burden of showing that he engaged in protected activity, that the employer knew of the employee's participation in protected activity, and that the employer took

adverse action motivated by that activity. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S; California State University, Sacramento (1982) PERB Decision No. 211-H.)

The party alleging discrimination must make a prima facie showing of unlawful motivation by demonstrating a nexus between the protected activity and the adverse action. Absent direct evidence, indications of unlawful motivation have been found in an employer's: (1) departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (2) timing of the action (North Sacramento School District (1982) PERB Decision No. 264); (3) disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (4) shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (5) words suggesting retaliatory intent (Santa Clara Unified School District, supra); or (6) a pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

A review of Johnson's allegations reveals that he failed to establish all of the elements of a prima facie discrimination violation. Johnson did participate in protected activity by filing numerous grievances of which the State was clearly aware.

Adverse action against Johnson is also established by the limit placed on his overtime hours. However, Johnson failed to establish the final element, that the adverse action was taken because he engaged in protected activity.

If the State had departed from standard practices and procedures, this would be evidence of unlawful motivation. However, here the memo limiting Johnson's hours was issued only after completion of medical and psychiatric evaluations which were performed after Johnson filed an injury report complaining of stress.

On appeal, Johnson argues that Vander Weide's reliance on the psychiatric evaluation to support the overtime reduction was improper. Johnson contends that it recommended a separate medical evaluation to determine if a work restriction is necessary, but that the psychiatric evaluation itself imposed no work restriction.

Vander Weide's memo indicates that it is based on both medical and psychiatric evaluations. The recommendations of the medical evaluation were not made part of the record. However, the psychiatric evaluation states, in part:

> I would recommend that Mr. Johnson contact his own G.P. and be given, possibly, some minor tranquillizers or sleeping medication on a short term basis to help him sleep. I would also recommend that he decrease his overtime hours in order to sleep and rest properly and be under less responsibility.

Thus, contrary to Johnson's assertions, the State did arguably have justification for limiting the overtime hours.

Further, Johnson contends that Vander Weide's failure to provide information of the overtime restriction to the other DYA facility where Johnson worked, indicates unlawful motivation. There is no basis for this contention. Vander Weide was properly concerned about the operation of his facility and acted to impose the overtime limitation only after receiving medical and psychiatric evaluations. Johnson provided no evidence of procedures that would require Vander Weide to notify other facilities.

Finally, there is also no evidence of disparate treatment. Johnson failed to provide examples showing that other employees, in similar circumstances, did not have their overtime hours reduced.

Accordingly, the charge fails to demonstrate the required "nexus" and thus, does not state a prima facie violation of Dills Act section 3519(a). Therefore, the charge must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-253-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Carlyle joined in this Decision.